

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1612 OF 2002

Sardar Refreshments ..Petitioner.

Vs.

State of Maharashtra & anr. ..Respondents.

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Mr.S.P.Kanuga with Mrs.Sapna N. Nath for the
Petitioner.

Mr.Shekhar Ingawale, AGP for the State.

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CORAM : DR.D.Y.CHANDRACHUD, J.

15th April, 2005.

ORAL JUDGMENT :

1. The Bombay Shops and Establishments Act 1948 inter alia defines the expression 'commercial establishment' in clause (4) of Section 2 to mean an establishment which carries on any business, trade or profession or any work in connection with or incidental or ancillary to any business, trade or profession. The definition also excludes certain establishments and among them are

residential hotels, restaurants, eating houses, theatres and other places of public amusement or entertainment. Clause (8) of Section 2 defines the expression 'establishment' inter alia to mean a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which the Act applies. Section 7 of the Act provides for the registration of establishments. Section 19 inter alia provides for the opening and closing hours of restaurants and eating houses. Sub section (1) of Section 19 provides that notwithstanding anything contained in any other enactment for the time being in force, no restaurant or eating house shall be opened on any day earlier than 5 a.m. and closed later than twelve midnight for service. The proviso thereto stipulates that an employee in restaurant or eating house may be required to commence work not earlier than 4.30 a.m. and shall not be required to work later than 12.30 a.m. Sub section (2) of Section 19 provides that subject to the provisions of sub section (1) the State Government may fix later opening or earlier closing hours for different restaurants or eating houses or for different areas or for different periods of the

year. A power to grant an exemption from the provisions of the Act is conferred in Section 4. Section 4 provides that notwithstanding anything contained in the Act, the provisions of the Act mentioned in the third column of Schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the schedule. By the proviso to Section 4, the State Government is empowered by notification in the official gazette to add, omit or alter any of the entries of the Schedule subject to such conditions if any that may be prescribed in the notification. The Second Schedule to the Act contains in pursuance of Section 4 a list of establishments and a statement of those provisions of the Act from which the establishments are exempted.

2. A restaurant by the name of Sardar Refreshments is in existence for well over two decades at Tardeo. The restaurant has an eating house licence. Entry 268 of the Second Schedule to the Bombay Shops and Establishments Act, 1948 which was added by a notification dated 9th September, 1991 of the State Government is in respect of the

establishment of the Petitioner viz. Sardar Refreshments, 164-A Tardeo Road, opposite B.E.S.T. Depot, Tardeo Bombay 400 034. Column 3 of the Schedule corresponding to this entry specifies that the establishment is exempted from the provisions of Section 19 subject to the condition that the establishment should not be opened on any day earlier than 12.00 noon or closed after 2.00 a.m. Thus, in so far as the governing provisions of the Bombay Shops and Establishments Act are concerned, the establishment of the Petitioner is duly registered and is specifically listed as one of those establishments which is exempted from the opening and closing hours that are specified in Section 19 subject to the condition that the establishment shall not open prior to 12.00 noon or close after 2.00 a.m.

3. Section 33 of the Bombay Police Act empowers the Commissioner, the District Magistrate or as the case may be the Superintendent of Police to make regulations with respect to the matters listed out in various clauses of sub section (1). Clause (xa) of sub section (1) which falls within the jurisdiction of the Commissioner is the

registration of eating houses including granting a certificate of registration in each case which shall be deemed to be a written permission required and obtained under the Act for keeping the eating house and the annual renewal of such registration within the prescribed period. Clause (w) inter alia provides for the licensing or controlling places of public amusement and entertainment. In Clause (wa) of sub section (1) provision has been made for licensing or controlling musical, theatrical and other performances for public amusement including melas and tamashas and regulating the hours during which and the places at which such performances may be given. An eating house is defined in Clause (5-A) of Section 2 to mean any place to which the public are admitted and where any kind of food or drink is supplied for consumption in the premises by any person owning or having an interest in or managing such place and includes a refreshment room, boarding house, coffee house and/or a shop where food or drink is supplied to the public for consumption but does not include a place of public entertainment. A 'place of a public entertainment' in clause (10) of Section 2 means a lodging house, boarding and lodging house

or residential hotel and includes any eating house in which any kind of liquor or intoxicating drug is supplied. The establishment of the Petitioner is not a place of public entertainment, since it is stated on behalf of the Petitioner that the Petitioner does not have a licence under the Bombay Prohibition Act, 1949 nor does it supply any kind of liquor or intoxicating drug. The establishment of the Petitioner is also not a place of public amusement within the meaning of Section 2(9). The grievance of the Petitioner in these proceedings under Article 226 arises out of an endorsement made on the eating house licence issued to the Petitioner under the Bombay Police Act, 1951 in which it has been stated that the establishment can remain open between 5 a.m. till 1.30 a.m. According to the Petitioner, the police authorities have no jurisdiction to make that endorsement particularly having regard to the fact that the hours during which the establishment may remain open are regulated by the Bombay Shops and Establishments Act, 1948, the Schedule where to expressly contemplates that the closing hours would be at 2.00 a.m.

4. An affidavit in reply has been filed to these proceedings in which it has been stated that an eating house licence is issued by the Police Department under rules framed under Section 33(1) (xa) & (y) of the Bombay Police Act, 1951. These rules, it is stated are known as the Greater Bombay Eating House Registration Rules, 1969. In addition, it has been stated that Government issues notifications or circulars from time to time regulating the timings upto which eating houses may be allowed to remain open. The policy of the Government at present, is according to the deponent of the affidavit reflected in a circular dated 24th May, 2001 under which all hotel establishments falling in the jurisdiction of the Police Commissioner Mumbai, Navi Mumbai and Thane are required to be closed by 1.30 a.m. In so far as the entry under Bombay Shops and Establishments Act, 1948 is concerned, it has been admitted in the affidavit in reply that the establishment of the Petitioner is exempted from the provisions of Section 19 subject to the condition that the establishment should not open earlier than 12 noon or close later than 2 a.m. According to the affidavit of the State the Bombay Shops and

Establishments Act, 1948 is an act to consolidate and amend the law relating to regulation and conditions of work, employment in shops, commercial establishments, residential restaurants and eating houses. It has been asserted that the time upto which an establishment may remain open to the public is governed by rules framed under the Bombay Police Act, 1951. According to the State, the circular dated 9th September, 1981 on which the Petitioner relies is outdated and that thereafter, the Home Department issued circulars on 10th March, 1989, 5th June, 1999 and 24th May, 2001, the last of which holds the field. Hence, it is urged that the notification dated 9th September, 1981 was issued to regulate the hours that the workmen would be required to spend in a hotel whereas it is for the Police Department under the Bombay Police Act, 1951 to regulate the timings during which eating houses may remain open.

5. At the hearing of this Petition, I have called upon the Learned AGP to seek instructions on whether the provisions contained in the Second Schedule to the Bombay Shops and Establishments Act, 1948 have been amended and, more specifically,

in regard to whether entry 268 which relates to the establishment of the Petitioner still governs the field. The Learned AGP on taking instructions states that there is no subsequent notification of the State Government either amending the Schedule or modifying entry 268 in relation to the establishment of the Petitioner. The Bombay Shops and Establishments Act is undoubtedly an Act to consolidate and amend the law relating to the regulation of the conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theatres, other places of public amusement or entertainment and other establishments. As a part of the statutory regulation, the Act provides for registration of establishments in Section 7, the opening and closing hours of certain establishments in Sections 10 and 11, the opening and closing hours of commercial establishments in Section 13, and the opening and closing hours of restaurants and eating houses in Section 19. Under Section 19 no restaurant or eating house can be opened before 5 a.m. or closed later than twelve midnight for service. Section 4 of the Act lays down that there shall be an exemption from the provisions of the

Act in respect of the establishments, employees and other persons mentioned in Schedule II from those provisions which are indicated in the Schedule. In so far as the Petitioner is concerned, there is a specific exemption from the application of Section 19 and the condition is that the establishment should not be opened earlier than 12 noon or closed after 2 a.m. This provision is a part of the Second Schedule to the Bombay Shops and Establishments Act, 1948 and is therefore, a part of the statute. If the State Government desires to bring about any change in the Second Schedule to the Bombay Shops and Establishments Act, 1948, it has the power to do so by the simple expedient of a notification under the Act published in the official gazette. Until that is done, it would be impermissible by means of an administrative circular to issue directions which would run contrary to the opening and closing hours as they exist in pursuance of the exemption granted in the Second Schedule with reference to the premises of an establishment listed therein. The affidavit filed by the State takes the position that the entry by which the establishment of the Petitioner was listed is outdated since the notification dated

9th September, 1981 by which it was introduced has been followed by succeeding notifications. The point, however is that none of the succeeding notifications purports to amend the provisions of Second Schedule to the Bombay Shops and Establishments Act, 1948. So long as that is not done, the exemption contained in the Second Schedule must continue to operate and any administrative action contrary thereto must be regarded as devoid of legal force.

6. Reliance has been placed by the State on an order of a Division Bench of this Court dated 20th June, 2001 in Mood Bar & Restaurant v. The State of Maharashtra (WP 1022 of 2001) decided by a Division Bench consisting of Mr. Justice A.P. Shah and S.A.Bobde J. In the Petition before the Division Bench a direction had been sought against the State to allow the petitioners a grace period of one hour after the closure of the restaurant at 12.30 a.m. The Division Bench noted that the Bar Owners Association had made a representation to the State Government to extend the closing time to 1.30 a.m. and that in order to resolve the grievance of the hotel owners' association the Government had

agreed to an extension of the closing time from 12.30 a.m. to 1.30 a.m. Accordingly, the condition of providing for eatables and liquor to be served only upto 12.30 a.m. came to be deleted. The order of the Division Bench, deals with the issue of bar owners. The Petitioner does not have a licence under the Bombay Prohibition Act, 1949 and does not sell any intoxicating liquor. That apart, from the order of the Court it is clear that the issue as to whether an exemption granted under the Second Schedule to the Bombay Shops and Establishments Act, 1948 could be overridden by an administrative circular which did not purport to alter the terms of the statutory exemption did not arise for consideration. In the circumstances, the Petitioner, in my view, is entitled to succeed. The endorsement which is made on the eating house licence of the Petitioner under the Bombay Police Act, 1951 in respect of the hours of work of the establishment is accordingly quashed and set aside. The Petitioner shall, however, continue to abide by the terms of exemption contained in the Second Schedule to the Bombay Shops and Establishments Act, 1948 so long as the exemption continues to hold the field. This shall, however, not preclude

the State Government from taking action in accordance with law to modify the terms of the exemption either in relation to the Petitioner or otherwise in order to ensure uniformity of practice.

The Petition is accordingly disposed of.